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Out-of-Hours Appointments: A Temporary Fix to a Permanent Problem?

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The past year has seen repeated attempts by the courts to solve the conundrum of electronic working and how it interfaces with out-of-court appointments of administrators. Six decisions, all conflicting in whole or in part, none likely to result in an appeal, did little to ease the uncertainty surrounding the validity of notices e-filed outside court hours by CE-File. There was no substantive attempt at resolution on the part of the Companies Court or the Insolvency Rules Committee; the Chancellor issued guidance to the effect that notices filed out-of-hours would be referred to a designated High Court Judge.

Prompted by the pressure on court resources and the increased focus on remote and electronic working, the Temporary Practice Direction Supporting the Insolvency Practice Direction attempts to address the problem.

The State of the Cases

The development of the law has undoubtedly been hampered by the way in which the courts have to deal with questions arising as to the validity of notices. All of the cases have been one-sided, with no party arguing against the validity of the notice in question. All of them have been urgent, so that there has been little time for proper reflection. Some of the cases have involved immediate, rather than reserved, judgments. Except in one case, not all of the prior cases have been cited to any one judge.

HMV Ecommerce

In *HMV Ecommerce* [2019] B.C.C. 887, directors filed notices of appointment of administrators at 5.54pm, after the court had closed at 4.30pm, using CE-File. They had a telephone hearing later that day, in which Barling J held that the notices were valid and took effect at the time at which they were filed.

At a subsequent hearing, Barling J considered the matter again, having had the provisions of the Practice Direction: Insolvency Proceedings brought to his attention. Paragraph 8.1 of the PDIP provided for an apparent restriction on the use of electronic working to file notices of appointment. Barling J described the terminology of the paragraph as "somewhat byzantine", found that the purpose of the paragraph was not immediately apparent, but also found that a breach would not result in invalidity of the appointment.

In the result, the judge held that the appointment was indeed valid and took effect from the time of filing, as acknowledged by the automated email from the court. He also confirmed that the steps taken by the administrators since the purported filing were valid, and for good measure extended time for filing the notice using a power in the CPR.

The effect of the decision, then, was that directors and companies could file notices of appointment of administrators out of court hours, and those notices would take effect at the time of filing.

Skeggs Beef

In *Skeggs Beef* [2020] B.C.C. 43, a QFCH filed a notice of appointment of administrators out of court hours using CE-File. The administrators subsequently applied for a declaration that their appointment was valid and effective from the date and time of filing.

Marcus Smith J considered in some detail the provisions of the Rules, the PDIP, and PD51O (the Electronic Working practice direction), in each case as they applied to the appointment of administrators by a QFCH.

Rule 3.20 provides that when (but only when) the court is closed, a QFCH could file a notice of appointment by faxing it to the court or emailing it to a designated email address. The QFCH would then have to take a number of procedural steps. Under r. 3.22, if those steps were taken, the appointment would be valid from the time and date of sending the email or fax.

PD51O, at para. 2.1, included an explicit restriction on the use of electronic working by a QFCH. Where a QFCH sought to file a notice of appointment, "and the court is closed", the filing "must be in accordance" with r. 3.20.

The judge reasoned that PD51O only permitted electronic filing where that was not inconsistent with other rules. Since rr. 3.20 to 3.22 provided for a regime for electronic filing by a QFCH, that regime continued to apply and was not overridden by PD51O. He then considered whether the failure to comply with the Rules was fundamental and resulted in invalidity or was merely a procedural breach, which could be waived by the court. He opted for the latter.

The result was that Marcus Smith J was prepared to grant a declaration that the appointment was valid and took effect from the date and time of filing.

The matter did not rest there. In obiter remarks, the judge also considered the decision in *HMV Ecommerce*. He noted that Barling J had not been shown the entire legislative history relating to electronic filing and held that it was "absolutely clear" that the appointment of administrators must be done under the Rules and not under PD51O.

The effect was that a QFCH could not use CE-File outside court hours, but the court might waive the defect if they did. Obiter, directors could not file notices of appointment out of hours by CE-File at all.

SJ Henderson & Co; Triumph Furniture

In *SJ Henderson & Co; Triumph Furniture* [2020] B.C.C. 52, ICC Judge Burton heard applications in relation to two unconnected companies. In each case, a director had filed a notice of intention and a notice of appointment, by CE-File outside court hours. Although *SJ Henderson* was decided after *Skeggs Beef*, the judgment in *Skeggs Beef* had not been published and so was not cited to Judge Burton.

Judge Burton's starting point was r. 12A.14 of the 1986 Rules, which enacted a general bar on electronic filing, but left open the possibility of electronic filing being authorised by another rule or practice direction enacted in the future. She then noted that PD51O, as originally drafted, expressly stated that it was an electronic working

scheme for the purposes of r. 12A.14 and did not expressly forbid a QFCH from using electronic working to file a notice of appointment.

When the 2016 Rules came into force, r. 1.46 permitted electronic filing only where permitted by the CPR, a Practice Direction or the Rules. PD51O was amended so as to state that it provided for electronic filing under the Rules. Against that background, Judge Burton considered para. 8.1 of PDIP.

She noted the serious consequences attendant on the appointment of administrators and found that it would be surprising if an appointment could be made at a time when court staff were not available to check the completeness or legibility of the forms filed. Extending such a right to directors and companies would require a clear Parliamentary intention, set out in legislation. Judge Burton's construction of para. 8.1 of PDIP was therefore that it excluded all notices of appointment from being filed by CE-File and that QFCHs should continue to follow the procedure in rr. 3.20 to 3.22.

Judge Burton then went on to consider the decision in *HMV Ecommerce*. Her view differed from that of Barling J, so that she held that an appointment out-of-hours by e-filing simply could not be made, even in a curably defective manner. It therefore followed that a notice filed by CE-File took effect from the date and time at which the court next opened for business. Her reasoning also extended to notices of intention.

The effect of the decision was therefore that directors and companies could file notices of intention and notices of appointment by CE-File, but that they would only take effect when the court opened, which would normally be 10am on the next business day.

All Star Leisure (Group)

In *All Star Leisure (Group)* [2020] B.C.C. 100, appointments by a QFCH were back under the spotlight. In the context of a pre-pack of a group of companies, the QFCH attempted to file a notice of intention in-hours using CE-File. Due to technical problems, the filing was not accepted until 4.54pm, the court having closed at 4pm. The pre-pack sale was completed at 5.12pm on the same day. Any invalidity could therefore have had grave consequences.

HHJ Cooke considered PD51O, para. 8.1 of PDIP, and rr. 1.46 and 3.20 to 3.22. He noted that r. 1.46 restricts the ability to deliver documents to the court by electronic means to such circumstances as may be "expressly permitted" by the CPR, a Practice Direction or the Rules. He went on to consider the rr. 3.20 to 3.22 regime and noted that it is not a mandatory procedure: r. 3.20 provides that a QFCH "may" file a notice of appointment in accordance with the rule. In HHJ Cooke's view, it was therefore open to the CPR, a Practice Direction or the Rules to make further provision for filing notices of appointment electronically.

It followed that PD51O could have authorised the filing of a notice of appointment by electronic means, but that a decision had been taken not to do so. HHJ Cooke therefore declined to follow *Skeggs Beef*. However, he noted the incongruity of permitting electronic filing at 3.50pm and not permitting electronic filing of the same documents at 4.10pm, as well as the variation of court opening hours between different courts exercising the same jurisdiction.

HHJ Cooke concluded that, whatever the deficiencies in the scheme of the legislation, the PDIP and the Rules, it was the case that QFCHs were not permitted to use CE-File to file notices of appointment when the court is closed and that the court would not be open for that purpose merely because CE-File was operational. HHJ Cooke considered that the defect was not fundamental, so that the notice would not be invalid, and made an order waiving the defect.

In an obiter remark, HHJ Cooke found that para. 8.1 of PDIP did apply to all notices of appointment, since – as he found – it must have been thought unnecessary or undesirable to extend the ability to file out-of-hours notices to companies and their directors. He also took the opportunity to disagree with *SJ Henderson*, and said that he preferred the reasoning of Barling J in *HMV Ecommerce*, to the effect that purported appointments by directors were not incurably invalid. Aside from misgendering Judge Burton, HHJ Cooke appeared not to have appreciated that Judge Burton had not found that the appointment was a complete nullity, but that it would take effect when the court was next open for business.

The effect of the decision was that a QFCH could not file a notice of appointment out of hours, but, if it did, then the court could waive the defect. Obiter, it was suggested that directors and companies were in the same position.

Keyworker Homes (North West)

The judgment in *Allstar Leisure* was given in ignorance of the decision in *Keyworker Homes (North West)* [2019] EWHC 3499 (Ch). *Keyworker Homes* was decided on 11th November 2019, some 17 days previously, but a transcript of the judgment was not made available until much later.

Keyworker Homes was a case in which directors had filed a notice of intention by CE-File on 11th October at 4.29pm, followed by a notice of appointment. The notice of appointment was submitted by CE-File at 6pm on 24th October. The automated email from the court acknowledged that the notice was accepted by the clerk on 24th October at 6pm, but that was followed by an endorsement on the notice to the effect that it was filed on 25th October at 10am. On one interpretation of the time limits, a filing on 25th October would be out of time, being more than ten business days after the notice of appointment.

HHJ Hodge QC focused his attention on the meaning of business days, eventually adopting the so-called "expansive" definition, which is that it meant "clear business days". However, although the judge referred to ICC Judge Burton's decision in *SJ Henderson*, it appears that either, again, it was not properly understood, or that the judge disagreed with it, but did not say so. HHJ Hodge QC said that he was in agreement with Judge Burton that a notice of intention could be validly filed out of hours. However, he did not appear to have taken on board the full import of Judge Burton's judgment, which also held that the notice would not take effect until the court next opened. He also appears not to have had in mind the full text of para. 28 of Sch. B1 to the Insolvency Act 1986, which provides for a period of "ten business days *beginning with the date on which the notice of intention to appoint is filed*".

HHJ Hodge QC began his count from Monday 14th October, being the first business day after Friday 11th October. On his reckoning, the tenth business day after 11th October was 25th October. However, since para. 28 requires the count to begin with the day on which the notice of intention is filed, it would only be appropriate to count from 14th October if Judge Burton were correct and the out-of-hours notice was effective from 10am on 14th October.

Be that as it may[1], HHJ Hodge QC found that the clear-business-days approach was correct and that the notice of appointment had been filed in time.

That, once again, meant that everything the court said next was obiter. HHJ Hodge QC went on to consider the decisions in *HMV Ecommerce*, *Skeggs Beef* (which, of course, was about QFCHs so that the judge's remarks were doubly obiter), and *SJ Henderson*.

In his analysis, HHJ Hodge laid great emphasis on r. 1.46, which is the rule dealing with electronic working. He agreed with Marcus Smith J's judgment in *Skeggs Beef*, that QFCHs could not file notices outside court hours by CE-File but, noting that Marcus Smith J's remarks about directors were obiter[2], concluded that companies and directors could use CE-File out of court hours to file notices of appointment and that, as well as being obiter, Marcus Smith J had been wrong. HHJ Hodge QC then returned to *SJ Henderson* and found that Judge Burton, too, had been wrong in that her approach did not take proper account of r. 1.46. He considered that something had gone wrong in the drafting of para. 8.1 of PDIP, a point specifically rejected by Judge Burton in *SJ Henderson*, in that para. 8.1 should have made clear that it only applied to appointments made by QFCHs.

The effect, then, of the judgment is that the days to be counted between notice of intention and notice of appointment are clear business days. Obiter, directors and companies can file notices of appointment out of hours, which take effect when filed. QFCHs must follow the procedure in rr. 3.20 to 3.22.

[1] HHJ Hodge QC's analysis was doubted by Zacaroli J in *Statebourne (Cryogenic)* [2020] EWHC 231 (Ch)
[2] Do two obiters make a ratio?

Symm & Co

Zacaroli J decided *Symm & Co* [2020] EWHC 317 (Ch) following a reference under the Chancellor's guidance. Company directors had filed a notice of appointment (without a prior notice of intention) on 4th February at 5.36pm.

Zacaroli J reviewed the legislative history of the Rules, as well as the decisions in *HMV Ecommerce*, *Skeggs Beef*, *SJ Henderson*, *Keyworker Homes* and *Allstar Leisure*. He concluded that PD51O did not apply to any notice of appointment of administrators outside court opening hours, so that neither directors nor companies could make out-of-hours appointments. His interpretation of the legislative landscape was that the Rules permit out-of-hours appointments to be made only by a QFCH, in provisions designed to replace those relating to the appointment of administrative receivers, who could be appointed without any time-restriction. Rule 1.46 was concerned with the mechanics of delivering documents to the court and was not intended to make substantive changes to long-standing policy concerning appointments by directors and companies. His view was reinforced by the absence of safeguards in relation to appointments by directors and companies that were equivalent to the stringent rr. 3.20 to 3.22 regime.

Zacaroli J then considered the consequences flowing from an out-of-ours filing of a notice. His view was that the defect was an irregularity capable of being cured, but that the appropriate cure was to treat the notice as effective from the time that the court opened. The situation was analogous to a physical notice left on the court counter at 8am, but which would not be accepted until the counter opened at 10am.

The judgment is the latest word from the courts. Its effect is that a notice e-filed by directors out-of-hours is defective but capable of cure, and the appropriate cure is to order that the notice take effect when the court is next open for business.

Summary of the Cases

The development of the case law does not reflect well on the judicial process. I cannot recall another instance in which judges have been so willing to depart from each other's decisions and so willing to stray from the subject matter before them in order to make obiter comments that themselves call into question other decisions. It is the more remarkable that the judges are doing this in a context in which they have not heard full argument on both sides and in which there is little or no prospect of an appeal.

The authorities cannot be sensibly reconciled. They treat e-filing of notices as follows:

- Subject to a problem I deal with below, notices of intention and notices of appointment filed by directors and companies outside court hours are not a complete nullity. All the cases except *Skeggs Beef* treat notices as capable of having some effect. However:
    - *HMV Ecommerce*, *Keyworker Homes* (obiter) and *All Star Leisure* (obiter) treat notices as taking effect when filed.
    - *SJ Henderson* treats a notice as having effect automatically on the next occasion the court is open for business.
    - *Symm & Co* treats a notice as procedurally defective, and that the appropriate cure is to order that the notice take effect from the next occasion on which the court is open for business.
- Notices of appointment by QFCHs are procedurally defective, but, subject to the same problem, can be validated so as to have effect from the date and time when filed: *Skeggs Beef*, *All Star Leisure*, *Keyworker Homes* (obiter).

The problem, which is not addressed at all by the cases, is what happens where the out-of-hours filing is deliberate. While the court does have an explicit power to cure a defect, that power is less likely to be used appropriately where the defect is the result of a deliberate breach of the rules. In each of the cases, the court has been at pains to point out the difficulty in construing the Rules, PDIP and PD51O and, indeed, the difficulty has been manifested in the differing conclusions to which each judge has come.

In the knowledge that this is an area of great uncertainty, it must be doubtful that directors, a company or a QFCH can safely file a notice by CE-File outside court hours relying on the court to put the defect right. Such a course might well amount to a deliberate breach, so that the court would be justified in refusing relief.

The Temporary Practice Direction

The TPD came into force on 6th April 2020 and remains in force until 1st October 2020 unless amended or revoked in the meantime. In relation to notices, para. 3 of the TPD makes the following provision.

Notices of appointment by a QFCH cannot be filed by CE-File outside "Normal Court Opening Hours". That phrase is capitalised as though it were a defined term, but in fact is not defined anywhere in the TPD. Elsewhere in para. 3 of the TPD, hours of 10am to 4pm are referred to, but those hours are not said to be "Normal Court Opening Hours". QFCHs are told that a notice of appointment may only be filed outside Normal Court Opening Hours using the procedure set out in rr. 3.20 to 3.22. Since Normal Court Opening Hours are not defined, I suggest that the phrase takes its ordinary and natural meaning and refers to the normal opening hours of the court in which the notice is filed. The paragraph does not say what the consequence is of any failure, but I suggest that a notice CE-Filed out of hours is defective and that, although the court could cure it, the court is unlikely to do so in the face of the well-publicised TPD.

Notices of intention and notices of appointment by directors and companies can be filed by CE-File during the period 10am to 4pm. Those notices will be treated as delivered at the time of the automatic email from the court confirming receipt of the filing.

Notices of intention and notices of appointment by directors and companies can be filed by CE-File outside the time period 10am to 4pm. Those notices will be treated as delivered at 10am on the day on which the courts are next open for business.

So, the approach of ICC Judge Burton to notices by companies and directors has been vindicated. A notice filed outside the period 10am to 4pm is not completely invalid, but will take effect when the court next opens for business.

The Future

Could this become a permanent part of the insolvency landscape? I agree with the approach in that a fundamental change to the ability of companies and directors to file notices outside court hours ought more properly to be done by the Rules, at the least, and possibly in the Act. Equally, however, it seems to me that the opportunity to bring the QFCH procedure into the modern means of conducting business has been squandered. There is no inherent advantage or safeguard in filing by fax or email as compared to filing by CE-File. In my view it would be more appropriate to extend e-filing to all notices, whenever filed, while preserving the differential treatment of when those notices take effect.

It is to be hoped that the problem will be addressed in a more permanent fashion before the TPD lapses or is revoked. Otherwise, the chaotic and uncertain state of the law as summarised above will revive.

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